



## Summary: Third Revised Draft of the Binding Treaty on Business and Human Rights

*This is an unofficial summary of the [third revised draft](#) of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (hereafter the Treaty), which was published on 17 August 2021. This summary focuses on the substantive provisions of the Treaty, as stipulated in sections I and II<sup>1</sup>. For additional information about and analysis on the Draft Treaty, please visit the Business & Human Rights Resource Centre's [Binding Treaty Portal](#).*

### SECTION I

#### Definitions (Article 1)

- **“Victim”** means any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively suffered harm that constitute human rights abuse in the context of business activities. The term “victim” may also include the immediate family members or dependents of the direct victim (Art. 1.1).
- **“Human rights abuse”** is any direct or indirect harm in the context of business activities, through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognised human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment (Art. 1.2.).
- **“Business activities”** means any economic or other activity, undertaken by a natural or legal person, including State-owned enterprises, financial institutions and investment funds, transnational corporations, other business enterprises, joint ventures, and any other business relationship (Art. 1.3.).
- **“Business relationship”** refers to any relationship between natural or legal persons including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State, including activities undertaken by electronic means.
- **“Business activities of a transnational character”** means any business activity (described in Art. 1.3.) undertaken in more than one jurisdiction or State; where a significant part of the activity takes place through a business relationship in another State or jurisdiction; or which has a significant effect in another State or jurisdiction. (Art. 1.4.)

#### Purpose (Article 2)

The purpose of the Treaty is to clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfil and promote human rights in the context of business activities, particularly those of a transnational character; to clarify and ensure respect and fulfilment of the human rights obligations of business enterprises; to prevent and mitigate the occurrence of human rights abuses by effective mechanisms of monitoring and enforceability; to ensure access to justice and effective, adequate and timely remedy for victims of human rights abuses; to facilitate and strengthen mutual legal assistance and international cooperation; and to provide access to justice and effective, adequate and timely remedy to victims of such abuses.

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<sup>1</sup> The full text of the Draft Treaty, as published by the by the UN Human Rights Council's open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG) can be accessed [here](#).

### **Scope (Article 3)**

The Treaty applies to all business activities, domestic and transnational, and covers all internationally recognised human rights and fundamental freedoms binding on the State Parties of the Treaty (hereafter States).

## **SECTION II**

### **Rights of Victims (Article 4)**

“Victims of human rights abuses in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms.” (Art. 4.1.)

Art. 4.2. explicitly affirms that victims have right to be “treated with humanity and respect for their dignity”, safety, physical and psychological well-being as well as their rights to privacy and civic freedoms. and guarantees the right to (gender sensitive) access to justice, reparation and effective remedy as well as the right to submit claims to courts and non-judicial grievance mechanisms (including through class actions); to “be protected from any unlawful interference against their privacy, and from intimidation, and reprisals, before, during and after any proceedings have been instituted,” as well as the right to access information and legal aid relevant to pursue effective remedy.

### **Protection of Victims (Article 5)**

“States Parties shall protect victims, their representatives, families and witnesses from any unlawful interference with their human rights and fundamental freedoms, including prior, during and after they have instituted any proceedings to seek access to effective, prompt and adequate remedy, as well as from re-victimization in the course of these proceedings.”

Furthermore, States are required to take adequate and effective measures to guarantee a safe and enabling environment for human rights defenders (HRDs), free from any threat, intimidation, violence or insecurity and to investigate human rights abuses and take action against those responsible.

### **Prevention (Article 6)**

Art. 6.1. requires States to effectively regulate all business activities of enterprises within their territory jurisdiction, or otherwise under their control, including those that undertake activities of a transnational character. States must also take appropriate legal and policy measures to ensure that business enterprises respect internationally recognised human rights and prevent and mitigate human rights abuses throughout their business activities and relationships (Art. 6.2.). For that purpose, States must require businesses to undertake human rights due diligence (HRDD), as follows:

- Identify, assess and publish any actual or potential human rights abuses;
- Take appropriate measures to avoid, prevent and mitigate identified actual or potential human rights abuses which the business causes or contributes to, and take reasonable and appropriate measures to prevent or mitigate abuses it is directly linked to through its business relationships;
- Monitor the effectiveness of their measures to prevent and mitigate human rights abuses; and
- Communicate their measures and policies to stakeholders.

According to Art. 6.4., HRDD measures must include: (a) human rights, labour rights, environmental and climate change impact assessments, (b) integrating a gender perspective, and (c) conducting meaningful consultations with affected individuals or communities, and other relevant stakeholders “while giving special attention to those facing heightened risks of business related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas.” These measures must also include (d) the free, prior and informed consent of indigenous peoples; and (g) enhanced due diligence measures to prevent human rights abuse in conflict affected areas, including situations of occupation.

States must also ensure effective national procedures to ensure compliance with these obligations and provide for adequate penalties for businesses failing to comply with the above provisions (Art. 6.6).

### **Access to Remedy (Article 7)**

Under Art. 7.1., States must enable victims' access to adequate, timely and effective remedy and access to justice and to overcome the specific obstacles which women, vulnerable and marginalized people and groups face in accessing such mechanisms and remedies. States must also ensure that their domestic laws facilitate access to information; enable courts to allow proceedings in appropriate cases; and "enact or amend laws allowing judges to reverse the burden of proof in appropriate cases to fulfil the victims' right to access to remedy where consistent with international law and its domestic constitutional law."

According to Art. 7.3., States must provide adequate and effective legal assistance to victims throughout the legal process, including by: (a) making information available and accessible to victims of their rights and the status of their claims, (b) guaranteeing the rights of victims to be heard in all stages of proceedings; (c) avoiding unnecessary costs or delays for bringing a claim; and (d) "removing legal obstacles including the **doctrine of *forum non conveniens*** to initiate proceedings in the courts of another State Party in appropriate cases of human rights abuses resulting from business activities of a transnational character."

### **Legal Liability (Article 8)**

Art. 8.1. requires States to "ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships."

States must ensure that their domestic law provides for or establishes:

- the liability of businesses without prejudice to the liability of individuals and does not make civil liability contingent upon finding of criminal liability or its equivalent for the same acts (Art. 8.2.).
- effective, proportionate, and dissuasive criminal, civil and/or administrative sanctions for human rights abuses (Art. 8.3.) and adequate, prompt, effective, gender and age responsive reparations to the victims of human rights abuses (Art. 8.4.).
- the liability of businesses and individuals for their failure to prevent another business or individual with whom they have had a business relationship, from causing or contributing to human rights abuses "when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse or should have foreseen risks of human rights abuses [...] but failed to take adequate measures to prevent the abuse. (Art. 8.6.).
- the criminal or functionally equivalent liability of businesses for human rights abuses that amount to criminal offenses under international human rights, customary international or domestic law (Art. 8.7.) and the criminal liability for acts or omissions that constitute attempt, participation or complicity in a criminal offense (Art. 8.10.).

Art. 8.7. stipulates that human rights due diligence does "not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses".

### **Adjudicative Jurisdiction (Article 9)**

Under Art. 9.1. jurisdiction over claims brought by victims, irrespectively of their nationality or place of domicile, vests in the courts of the State where the human rights abuse occurred and/or produced effects; an act or omission contributing to the human rights abuse occurred; where the abuse is committed; where the perpetrator is domiciled; or where the victim is a national of or is domiciled.

Courts shall avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings (Art. 9.3.). In cases where claims are brought against business(es) or individual(s) not domiciled in the territory of the forum State, Courts have jurisdiction if the claim is connected with a claim against a legal or natural person domiciled in the territory of the forum State (Art. 9.4.); or if no other effective forum guaranteeing a fair judicial process is available and there is a connection to the State concerned (Art. 9.5).

### **Statute of Limitations (Article 10)**

Art. 10.1. requires States to adopt any legislative or other measures necessary to ensure that statutory or other limitations do not apply for the commencement of legal proceedings in relation to human rights abuses resulting in violations of international law which constitute the most serious crimes of concern to the international community as a whole.

For civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole, States must ensure that statutory or other applicable limitations allow a reasonable period of time for the commencement of legal proceedings (particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time) (Art. 10.2.).

### **Applicable Law (Article 11)**

Matters of procedure shall be governed by the law of that court seized on the matter. Upon the request of the victim, matters may be governed by the law of another State where the acts or omissions have occurred or produced effects; or where the alleged perpetrator is domiciled (Art. 11.2.).

### **Mutual Legal Assistance and International Judicial Cooperation (Article 12)**

States shall make available to one another, mutual legal assistance and international judicial cooperation to the fullest extent possible. States may invite any State not party to the Treaty to provide mutual legal assistance and international judicial cooperation. This includes initiating and carrying out investigations, prosecutions, judicial and other criminal, civil or administrative proceedings (including access to information and supply of all relevant evidence).

### **International Cooperation (Article 13)**

States must cooperate in good faith to enable the implementation of their obligations recognised under the Treaty and the fulfilment of its purpose. States recognise the importance of international cooperation and will undertake appropriate and effective measures in this regard, between and among States and in partnership with relevant international and regional organizations and civil society.

### **Consistency with International Law principles and instruments (Article 14)**

States must carry out their obligations under the Treaty in a manner consistent with, and fully respecting, the principles of sovereign equality and territorial integrity of States. Nothing in the Treaty shall affect any legal provisions that are more conducive to the respect, protection, fulfilment and promotion of human rights in the context of business activities and to guaranteeing the access to justice and effective remedy to victims.

### **Section III**

*For further information on the provisions regarding Institutional Arrangements; Implementation; Relations with Protocols; Settlements of Disputes, Signature; Ratification, Acceptance, Approval and Accession; and Entry into Force, as stipulated in in Articles 15 – 24, please refer to the [3<sup>rd</sup> Revised Draft Treaty](#).*